

1-1-1958

A Rejoinder to Professor Nagel

Lon L. Fuller

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Fuller, Lon L., "A Rejoinder to Professor Nagel" (1958). *Natural Law Forum*. Paper 30.
http://scholarship.law.nd.edu/nd_naturallaw_forum/30

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

A REJOINDER TO PROFESSOR NAGEL

Lon L. Fuller

WHEN I HEARD that Professor Nagel would comment on my paper at the 1956 meeting of the Eastern Division of the American Philosophical Association I looked forward with real anticipation to learning his views on the central problem of my essay. I have never been content either with my own way of presenting that problem or with my somewhat groping attempts to answer it. Phrases like "a merger of fact and value" are unsatisfactory and serve not so much to extend knowledge as to acknowledge and chart its limits. I had hoped that a logician of Professor Nagel's acumen would either sharpen my phrasing of the problem or identify some fault in my analysis responsible for creating the appearance of a problem where none in fact existed.

So far as I can see, neither of these things happened; and by the time I reached the end of Professor Nagel's comments every hope I had entertained for a profitable exchange had been shattered. To be sure, Professor Nagel begins on a tentative note and with an expression of apologetic doubt whether he has truly understood my meaning. But as he proceeds, these uncertainties disappear; and before he is through, I am presented as someone intent on "fuzzing" the most obvious truths, presumably in the interest of some unclean social doctrine. Indeed, I am made to "break a lance" for the most extraordinary views: that the whole of human history is a single process which may be described as the unfolding of one purpose shared by all mankind; that if the judges of former centuries could revisit the earth they would recognize that our courts are merely bringing to more successful articulation what they had been trying to say centuries before, etc. When one is confronted by misinterpretations of this magnitude, it is hard to know where to begin in trying to re-establish effective communication. I shall, however, do my best.

The Meaning of "Natural Law"

In the first paragraph of my essay I recognized the difficulties which arise from the fact that the term "natural law" has many meanings. My object was to concentrate on one crucial issue which seems generally to be

implicated whenever men speak of the opposition of the schools of "natural law" and "positivism." I considered it unwise to complicate that issue by attempting to pass judgment en route on the views of the differing schools of thought which may be brought under the common rubric of "natural law."

This invitation to narrow the scope of the inquiry was declined by Professor Nagel. He assumes that there is some single body of beliefs called "the natural law doctrine" which may safely be left undefined, and that he is in a position to assert that this undefined doctrine "supplies neither a tenable nor a useful basis for evaluating existing law." He also feels justified in asserting that this "doctrine" is one that I do not find "uncongenial."

To avoid further misunderstanding I should like to record here that I do not accept any "doctrine of natural law" which asserts one or more of the following propositions: 1) the notion that the demands of natural law can be the subject of an authoritative pronouncement; 2) the notion that there is something called "*the* natural law" capable of concrete application like a written code; 3) the notion that there is a "higher law" transcending the concerns of this life against which human enactments must be measured and declared invalid in case of conflict. I do not know whether Professor Nagel regards as a perversion of language any theory that calls itself "natural law" and at the same time makes the exclusions I have just outlined. If he does, I can only plead in defense that this particular perversion is at least as ancient as Aristotle, in whom I find no trace of the elements I reject.

On the affirmative side, I discern, and share, one central aim common to all the schools of natural law, that of discovering those principles of social order which will enable men to attain a satisfactory life in common. It is an acceptance of the possibility of "discovery" in the moral realm that seems to me to distinguish all the theories of natural law from opposing views. In varying measure, it is assumed in all theories of natural law that the process of moral discovery is a social one, and that there is something akin to a "collaborative articulation of shared purposes" by which men come to understand better their own ends and to discern more clearly the means for achieving them.

Apparently this notion of a "collaborative articulation of shared purposes" is to Professor Nagel the sheerest nonsense, with the qualification that "individuals and groups" do at times "engage in a collaborative process by which common goals are established and articulated." The meaning of this concession, and the reason it is restricted as it is, are unclear to me. The explanation nearest at hand is that Professor Nagel believes that collaboration

of the type I have envisaged is possible only within a group where some uniformity of moral values has already been impressed on its members by a common social environment. If this is the meaning intended, it remains puzzling why collaborative discussion could clarify or improve a culturally conditioned uniformity; a man scarcely turns to his fellows for assistance in discerning what the forces of his environment compel him to do; one hardly needs help in responding to inevitability. I am inclined to believe that even with respect to the small group Professor Nagel means something different by his articulation of common goals than I do when I speak of an articulation of shared purposes. He apparently believes that even within the small group it is absurd to think that a pooling of insight and experience could assist the members of the group to understand more truly their own ends. This interpretation seems to be supported by the fact that Professor Nagel couples the "articulation" of common goals with their "establishment." Apparently he has in mind that "common goals," that is, goals already understood and shared, may be "articulated" by being brought unchanged to adequate verbal expression, and may then be "established," that is, given some formal sanction as a part of the rules governing the activities of the group. Beyond this he seems unwilling to concede any function to collective intellectual effort.

At this point I encounter what is to me the most puzzling aspect of the philosophy implied in Professor Nagel's comments. On the one hand, he seems to reject as intellectual folly any collaborative quest for a better understanding of the proper ends of a society. At the same time, he castigates "the doctrine of natural law" for pretending to be the only theory that attempts to formulate "objective standards for the moral evaluation of the law." This claim he counters by asserting that the natural law doctrine is only one of many ethical theories professing to offer "objective standards" of moral evaluation. One wishes at this point he had identified at least one of these rival theories and had explained how it is that a standard can be "objective" and yet not be capable of improvement by common intellectual effort.

One can understand the reluctance of a scholar to force within the compass of a short article a discussion of subtle and complex theories. On this ground one may excuse Professor Nagel's failure to specify and describe any ethical theory that does not profess "the natural law doctrine" and yet yields "objective standards for the moral evaluation of the law." This excuse could have been claimed with better grace, however, had the same scholarly restraint been applied to the discussion of natural law, where Professor Nagel seems quite content to deal and judge in terms of verbal slogans.

Perhaps it is unfair to suggest that Professor Nagel has applied a double standard of scholarly restraint in dealing with his friends and his foes. He obviously considers that my article demanded a counterattack and he may therefore rightly claim the license accorded the polemicist. If this be conceded, it still remains true that his failure to take a clear position with respect to any ethical theory other than that of natural law makes it difficult to discern the vantage point from which he dispatches his critical shafts. In a concluding section of this reply I shall indicate the sort of ethical theory that seems to be implied in Professor Nagel's statement of his position. Meanwhile, it is first necessary to clarify the crucial issue that separates us.

Toward a Delimitation of the Issues

One argument made by Professor Nagel seems to me to be quite unresponsive to any issue raised by my article. This is his declaration that what I am asserting "is at best a tautology," and amounts to saying that there is an element of evaluation in any inquiry which seeks to determine how effectively a purposive system (such as a machine or a human being) is accomplishing its objective. I must say that however groping and unsatisfactory my discussion may be, I do not think I was foolish enough to advance as an important truth the proposition that evaluation equals evaluation.

I have never denied that there are two postures of the mind toward reality that can be called "descriptive" and "evaluative." The question I proposed for discussion was whether an attempt at description can succeed in eliminating evaluative elements when it is addressed toward the functioning of a purposive system. It was precisely because I wished to raise this question without running the risk of falling into a tautology that I chose my illustration of the boy with the clam, where descriptive and evaluative efforts cannot at the outset be considered as being carried on simultaneously because we do not at first know what the boy is trying to do.

Another false issue seems to me to be raised by those passages in Professor Nagel's article in which he appears to say that I am, in effect, counselling snap judgments, that if my views were taken seriously the physician would feel free to prescribe remedies without diagnosing his patient's condition, the judge to sentence the accused without hearing the evidence, etc. I see nothing in my position suggesting any disparagement of careful observation, painstaking analysis, patient reflection, or the fair treatment of defendants. Professor Nagel's assumption to the contrary simply reflects his belief that none of these desiderata will be achieved unless we are prepared

to accept his views concerning the nature of the evaluative process. This simply brings us back to the central issue of the whole debate.

Still another general point is made which, it seems to me, in no way advances our discussion. This consists in asserting that my "premises are not obviously relevant for grounding my conclusions." By this I take it Professor Nagel means to suggest that even if I were correct in what I have to say about the relation of "is" and "ought," I would still have established nothing "obviously relevant" to the assertions made, and the questions raised, in the latter part of my article. Certainly I can understand why Professor Nagel is unable to discern any clear line of thought connecting the various portions of my article. Essentially he seems to regard the questions I raise concerning the relation of "is" and "ought" as nonsensical. If I myself were to encounter an ethical theory which took as its starting point the question whether all garks are savigrous I, like Professor Nagel, would have difficulty in seeing what either an affirmative or negative answer to that question would entail.

It is Professor Nagel's deep conviction that the question I am raising is nonsensical which is responsible, I believe, for the truly colossal failure of communication which has taken place between us. The fact that he approaches my whole article with that conviction has made it impossible for him to approach sympathetically the notions I was trying to expound in the last part of my article, though I regret to say it has not prevented him from passing some sweeping negative judgments about views which he seems obviously not to have understood. If there is any hope for understanding, it must lie in a clarification of the basic issue raised by my article.

A Restatement of the Issues Raised in my Article

As I see it, two closely related issues are raised by the exchange between Professor Nagel and myself:

- (1) Is it always possible to give an adequate non-evaluative account of any object that is itself the subject of an evaluation?
- (2) If so, does evaluation become legitimate (or "competent") only when its object is first identified by such a non-evaluative account?

If I understand him correctly Professor Nagel gives an affirmative answer to both of these questions. While the assumption that an affirmative answer is the proper one runs through his whole article, so far as I can see Professor Nagel devotes only five sentences to what seems to be an argument for his position. These five sentences are as follows:

I shall first try to show that Professor Fuller's illustration presupposes

the distinction between fact and value. According to him, when we once grasp the purpose which actuates a boy's manipulation of a clam, we discover in the structure of events as they unroll "an element of value"; and we can anticipate whether a certain action will be continued or not, because the action is regarded as good or as bad as a means for achieving the boy's objective. But just how does the example show that fact and value *merge*? In characterizing one of the boy's actions as "bad," it is surely pertinent to ask *what* it is we are so characterizing; and the answer must inevitably be descriptive of a fact. Indeed, unless a careful factual account can be given, one that is not colored by surreptitious value imputation, we cannot judge competently whether the act does have the value attributed to it.¹

If there is any "tautology" in our exchange, I submit it lies in these sentences. If it were true, as Professor Nagel assumes, that we can always give two distinct accounts of any course of purposive action, each adequate within its own realm, the one descriptive, the other evaluative, then it would certainly follow that the evaluative account would constitute a judgment or a series of judgments about the object of the descriptive account. The question is whether this separation of the two kinds of accounts is always possible or profitable, and whether accuracy of description is always promoted by eliminating evaluative judgments.

In my illustration of the boy and the clam I had supposed that even if we were interested in the "pure fact" of the occurrences there related — say, in the directions and dimensions of the boy's physical movements — we could envisage that "pure fact" more accurately if we knew what the boy was trying to do. The effect of a disclosure of the boy's purpose in bringing about a sudden enlargement of perspective was to be explained in part, I had assumed, because we were now in a position to participate vicariously in a process of evaluation; that is, we could now understand (and thus describe more accurately even in purely physical terms) what happened when the boy moved from one activity to another. These suppositions still seem to me to be completely justified, and I find no reason advanced by Professor Nagel for abandoning them.

In understanding the point of my illustration it should be noted that it does not relate to a single action, but to a course of conduct extending through time, in which transitions from one act to another are determined by judgments as to what is apt and what is not for the accomplishment of the boy's purpose. In this connection I should like to recall a passage in my

1. *Supra*, 79.

article, the thought of which seems to me to be largely ignored in Professor Nagel's criticism:

[W]hen we are dealing with purposive action projected through time, the structure that we observe, recall, and report lies, not in any instantaneous state of affairs, but in a course of happening, which can be understood only if we participate in a process of evaluation by which the bad is rejected and the good retained.²

The insistence that there must always be something that can be described in non-evaluative terms before evaluation itself can be justified reminds one of the controversy about empirical verification that arose out of the movement called logical positivism. Logical positivism started with the proposition that it is only those sentences which can be "empirically verified" that are meaningful, that is, proper subjects for intelligent discussion and argument. As it gradually became clear what complexities inhere in the notion of empirical verification, particularly as applied to "a sentence," the adherents of logical positivism found it necessary to retreat from their original position. A convenient cover for this retreat was found in the notion of verification "in principle." It having been discovered that it was impossible in practice to give a meaningful account of what would be involved in actually verifying a sentence empirically, the original proposition was modified to read: "Only those sentences are meaningful that are *in principle* subject to empirical verification." So in a similar manner we now find it being asserted that "in principle" evaluation never becomes justified until we have described accurately in non-evaluative terms the thing we are evaluating.

How far this insistence can be carried is illustrated in the comments of another critic. In a book discussed by this writer I had remarked that if we were confronted by a dubious assemblage of mechanical parts and were to ask of it, "Is it a steam engine?" and, "Is it a good steam engine?" these two questions would "overlap mightily."³ My critic responded that this is not necessarily so at all and indicated that the whole difficulty could be removed by a little definitional ingenuity. He suggested that by stipulation we might define a steam engine in non-evaluative terms, as requiring certain parts, arranged in a certain relationship to one another.⁴ Of course, an attempt at such a definition might be made, but what earthly purpose could

2. *Supra*, 70.

3. THE LAW IN QUEST OF ITSELF 11-12 (1940).

4. Samuel Mermin, *The Study of Jurisprudence—A Letter to a Hostile Student*, 49 MICHIGAN LAW REVIEW 39, 65 (1950).

it serve unless it be to support "in principle" a philosophic position taken in advance and now confronted by an embarrassing example? Parenthetically, it can be confidently predicted that the attempt at a "non-evaluative" definition of a steam engine would inevitably miss its mark; ambiguities would always be latent in the definition which would have to be resolved in favor of that meaning most apt in describing a machine fit to serve the general purpose of a steam engine. Professor Nagel's position seems to be essentially that of the critic just discussed. He too supports the rigid separation "in principle" of "is" and "ought," though he cautiously refrains from informing us how he himself would describe in non-evaluative terms those physical actions which he would categorize as "good" or "bad" attempts to open a clam.

In seeking to keep the discussion of the relation of "fact" and "value" on a level where misunderstanding is least likely, I have emphasized in my writings situations involving physical movements and artifacts like chairs and steam engines. This is the arena of discussion most uncongenial to the tentative conclusions I have attempted to convey, for here what I have to say runs counter to the tacit assumptions of language itself. It is on this elementary level that unreflective common sense is most inclined to embrace the fallacies of what may be called the pointer theory of meaning.

If we move the discussion to the realm of legal and moral ideas, the whole controversy assumes a different aspect. Here the picture of a kind of evaluative finger pointing itself toward "things" loses even the specious appeal it has in more elementary contexts. During the oral discussion of my paper I attempted unsuccessfully to induce Professor Nagel to state how he would deal with problems of the following sort: Let us suppose a rule of the common law. Though this rule is treated by lawyers, judges, and legal scholars as if it were a single, existent thing, it never receives quite the same verbal formulation in any two statements of it. In such a situation evaluation may be comparatively easy. To those who have given serious thought to the problems involved, it may be possible to range the various formulations of "the rule" roughly on a scale of adequacy; in any event it is easy to recognize gross ineptitudes. But what shall we say of "existence"? What "is" the thing, or what "are" the things, lawyers have in mind when they agree in saying, "*This is a poor formulation of the rule*"? In neither case can the "thing" be mere words on paper, for the same words will provoke different responses in different readers. A perceptive reader may pass over almost unnoticed an inadequacy in formulation, since his mind seizes at once the thought toward which the author was groping unsuccessfully. The mind of

a less perceptive reader may waver in indecision among various obscure and unsatisfactory meanings. The same uncertainty of response even more obviously makes impossible a definition of "the rule" in terms of patterns of human behavior. I have asked, and I ask again: In this sort of context how do we apply the dogma that before we can evaluate we must first define clearly in non-evaluative terms the thing it is we are evaluating?

The fundamental article of the positivist faith is that "law" either exists or does not and that no evaluation is involved in reaching a judgment about its existence. I have tried to show the difficulty in maintaining this belief when we apply it to "law" in the sense of a "rule of law." But suppose the question to be, not that of the existence of a particular rule of law, but of a legal order. Here again the view of positivism is that a legal system can be thoroughly "bad" from top to bottom by any number of standards and yet be a regime of law. But by what process of judgment do we decide whether something "is" a legal order?

I suppose that no one would discern a "legal order" in any of the following imaginary situations: 1) verbal directives called laws are issued by something that calls itself a government, but there is no discernible correspondence whatever between the acts of those who purport to enforce the law and the rules they purport to enforce; 2) verbal directives called laws are issued, but they are all kept secret or are published in a cipher known only to the legislator; 3) verbal directives called laws are issued, but they are all retrospective in effect and no prospective laws are ever enacted. In all of these situations there is so gross a departure from the ideal of a legal order, even of an order devoted to evil ends, that nothing exists in any of them we would be tempted to call "law." Yet the ideal of a legal order is never attained perfectly. In all legal systems there is some discrepancy between formal rules and governmental actions taken pursuant to them. Everywhere we encounter the problem of poorly drafted rules and rules that are conveyed inadequately to those who are affected by them. Probably all governments have from time to time undertaken to cure past irregularities by retroactive statutes.

If what I have just said is correct, it follows that the "existence" of a legal order is always a matter of degree and cannot be measured in "non-evaluative" terms. How, then, in determining whether a legal order "exists" do we distinguish between the "existent thing" and its "value"? Or is the doctrine of a strict separation of "is" and "ought" to be rescued once more "in principle"? Will the answer be that there must always exist in a given society some particular complex of words, attitudes, and actions before I can

say of it, "This falls short of the ideal of a legal order"? What utility is there in this insistence if in fact the only significant thing I can say about this social complex is that it *does* fall short of the ideal of a legal order? Surely it would be absurd to assert that I must colligate in "neutral" terms every existent thing embraced by such a judgment before the judgment itself can be "competent." To do so would be like saying that unless we can trace the precise trajectory of a marksman's bullet we have no right to assert that it missed the target. Surely we can say that a legal system is missing its target without having to report the precise angle of divergence of every human action that contributes to that missing. We can also say of something that calls itself a legal order that it is missing that target so woefully that it cannot in any meaningful sense be termed a system of law. It has, if you will, so little "value" that it has ceased to "exist."

Until Professor Nagel, or someone sharing his views and possessing his logical acumen, is prepared to take a position with reference to questions of the sort I have just posed, there seems no escape from the conclusion that for the time being professional philosophers of his school of thought are more concerned with supporting a theory taken in abstraction from the law than they are with lending a hand in solving the problems of legal philosophy.

Fact and Value in the Administration of the Law

In his brief reference to courts of law, Professor Nagel appears to assume that the administration of the law presents no special difficulties for his view. Indeed he seems to believe that it is especially obvious in the law that evaluation cannot be competent unless it is directed toward an object first identified in non-evaluative terms. I believe, on the contrary, that an open-minded examination of legal problems will reveal how impossible it is to maintain in any actual process of human decision a rigid separation of fact and value of the kind recommended by Professor Nagel.

The great advantage of the study of legal materials lies in the fact that the law cannot be content to maintain a distinction "in principle"; if it accepts a distinction as sound, it is compelled to find some way of giving effective expression to it in the actual decision of controversies. If it is believed that a witness must report what he saw in completely non-evaluative terms, then the judge must decide what questions may properly be addressed to him and what forms his responses may take. Let me illustrate the difference between problems as they arise in the administration of the law and as they are likely to be conceived in philosophic discourse.

Two philosophers are debating about "value" and "fact." One of them says, "It is not true that evaluation only becomes possible if its object can be identified in non-evaluative terms. For example, I can say of a dancer, 'He is trying to tango, but is not succeeding.' I can say this even though it would be impossible for me to describe what he is in fact doing." His opponent, quite undisturbed by this example, may reply, "Ah, but there must always exist some pattern of motions to which your value judgment that his attempt to tango is unsuccessful can apply; otherwise it would be meaningless. The more accurately this pattern is described, the more competent will be the value judgment passed on it." There the matter has to rest.

Suppose, however, that a dancing couple is employed by a night club on the basis of an assurance that they can do all the standard ballroom steps. On their first appearance a tango is played, and they are discharged for being unable to tango. They bring suit for improper discharge. In support of its case the company operating the night club wishes to put on the stand various patrons who were present during the disputed dance. The judge must now decide what form their testimony may take. Will they be required to describe the dance performed in terms of physical motions, leaving it to the jury to determine whether the dance so described is an adequate tango? Or will they be permitted (subject to cross examination on their competence) to say something like, "Whatever they were doing, it was not a tango"?

The philosopher may be inclined to distrust the alleged lessons of legal experience. He may consider that the judicial process is surrounded by an air of exigence not conducive to clarity of analysis, or that the law to get its job done has to make compromises that would not be tolerated in philosophic discussion. I do not think the possible contribution of the law to philosophic theory can be dismissed so casually. After all, the most relevant peculiarity of the law lies in its responsibility to reach and explain decisions. It seems to me that modern epistemology is coming more and more to recognize that there is an element of responsible decision in all intellectual activities, including those of science.⁵ One philosopher suggests that the present "age of analysis" is giving way to an "age of decision."⁶ Surely if this is true the decisional science called law should offer something of interest to the epistemologist.

I have already tried to show that in legal reasoning generally no such distinction as that insisted on by Professor Nagel is or can be made. Consider, for example, the rules which state under what circumstances the various

5. MICHAEL POLANYI, *THE LOGIC OF LIBERTY* (1951).

6. MORTON GABRIEL WHITE, *TOWARD REUNION IN PHILOSOPHY* (1956).

forms of legal responsibility arise. Most of these rules will turn on fault or negligence. A enters into an oral agreement with B; he thinks he said one thing; B interpreted him to mean something else. In general the principle is that there is no contract if both were at fault in the misunderstanding or if both were without blame. If, however, one was negligent while the other was not, the court will enforce the contract in accordance with the understanding of the prudent party. The term "negligence" is plainly a term of evaluation, but there is generally in the law no "non-evaluative" colligation of the things or instances to which this term should be applied. The ways of missing the target are countless and unpredictable; they can only be given a meaningful classification under the rubric "misses."

Again, though it is said to be the function of a jury to determine "facts," when a jury is asked to bring in a special verdict, the question addressed to it will almost invariably be one soliciting what in philosophic discussions would be regarded as an evaluation: "Was the defendant proceeding with due care?" "Was the apartment in suitable condition for occupancy?"

Generally speaking it is only with respect to the testimony of witnesses that it becomes possible even to consider maintaining a distinction between evaluating and identifying the object of the evaluation in "neutral" or "factual" terms. There is in this field an interesting experiment directed toward giving effective legal sanction to the desideratum urged so strongly by Professor Nagel. This is the Opinion Rule as developed in this country, though not followed in England or on the Continent. In general terms this rule states that an ordinary witness who has observed some event may testify only to what he heard and saw; he may not give "opinions."

Under this rule a witness who observed an accident when an automobile skidded on glare ice may not tell the jury that the defendant was going "too fast"; he must instead attempt to estimate the speed of the car in miles per hour and leave it to the jury to say whether operating a car at that speed under the conditions then obtaining was an act of negligence. Again, a witness may not describe a fence along a railroad right of way as being "not in a fit condition to turn cattle," but must attempt some more "factual" account of its condition, from which the jury may decide whether a fence so described was "fit" to turn cattle.

There have always been exceptions to this rule. Curiously, one of the most firmly established is that relating to testimony concerning economic value. Under this exception a plaintiff is permitted to testify, for example, to the value of services rendered as a part-time housekeeper or to the value of a used desk lost in shipment. Other exceptions permit the witness to say

that a person "looked angry," or "acted insane," or "seemed to be sick." Perhaps statements of the last-mentioned variety might be dismissed from the present discussion on the ground that, although they may be called "opinions," they are not evaluative. I suggest, however, that the difficulty in knowing just what kinds of testimony should be regarded as "evaluative" is something that should be pondered before Professor Nagel's view is accepted as a general guide in the actual solution of legal problems of proof.

With all its exceptions and qualifications, the Opinion Rule has been condemned, I believe, by every careful student of the law of evidence.⁷ The reason for this condemnation does not lie in the notion that the jury ought to have the benefit of the witness's opinion or "value judgment." It is rather that in many situations it is simply impossible for the witness to communicate to the jury the fact of what he saw in non-evaluative terms; he can feel more assured of his own honesty if he says "the car was going too fast when it skidded," than if he is compelled to give an estimate of its speed in miles per hour. Of course, the conclusion that a statement of value, "too fast," may be the most effective way of communicating a situation of fact to the jury presupposes some community of purpose and some common human nature shared by the witness and the jury. Some may regard this as a fatal objection to it. But those concerned with the actual administration of the law have to accept this supposition if it seems to have reality in the discourse of man with man.

*Ends Out of View and the Collaborative
Articulation of Shared Purposes*

We now reach that portion of my article where, in Professor Nagel's opinion, absurdity reaches its acme and where he confesses he finds my views "incredible."

With respect to the "end out of view," Professor Nagel's demonstration of the absurdity of my remarks is somewhat facilitated by a misquotation in which I am made to speak of the "end-in-view" being "out of view." While I certainly said nothing like that, the idea I attempted to convey was that in

7. 7 WIGMORE ON EVIDENCE §§1917-1929 (3d ed., 1940). MCCORMICK, EVIDENCE 19-28 (1954); AMERICAN LAW INSTITUTE, MODEL CODE OF EVIDENCE, Rule 401 (1942). The virtual abolition of the rule as it existed in the American common law in Rule 401 of the CODE is thus explained, p. 201: "Where a witness is attempting to communicate the impressions made upon his senses by what he has perceived, any attempt to distinguish between so-called fact and opinion is likely to result in profitless quibbling. Analytically no such distinction is possible."

disposing of controversies and issuing directives we may operate within a framework of purposes which conditions our decisions even though only certain of these purposes are called into consciousness by the facts of the case at hand. Although I had thought of this as being an almost obvious truth of psychology, it is for Professor Nagel a "myth."

All I can assert in response is that I am unable to attribute any clear meaning to Professor Nagel's discussion of this point. What he *seems* to say — which I in turn find "incredible"— is that our actions and words can never be directed or conditioned by any end or assumption not actively present in consciousness. If this were so, I could not go into the library and come back absorbed in reading a book unless I had formed the conscious purpose of returning to my office. I am puzzled by Professor Nagel's failure to touch even tangentially on the illustration I borrowed from Wittgenstein. I say to another person, "Show these children a game." The possibility that this might be taken to mean they should be taught to throw dice does not enter my mind. Had the addressee of my remarks been a notorious gambler, I might well have added, "but not your kind of game." In the actual context of my remark, however, there was as little reason to give conscious attention to that possibility as there is for me to ask myself as I get out of bed in the morning whether the floor will be still there to receive me. In his illustration Wittgenstein asks whether I can truthfully say, "I did not mean that kind of game," only if I had consciously considered the throwing of dice and had consciously excluded it. I can see no justification for Professor Nagel's casual dismissal of this problem with such epithets as "myth" and "product of dubious reasoning."

Closely associated with the notion of "the end out of view" was my discussion of the "collaborative articulation of shared purposes." Here again Professor Nagel seems to me to say nothing to which I can respond except by trying to convey more adequately the point I attempted to make in the first place.

Let me this time give an illustration in the form of a series of imaginary judicial decisions. Of necessity, my presentation will be schematic, and I shall have to leave it to the reader familiar with the growth of the common law to say whether I have truthfully portrayed any aspect of the judicial process. The cases that follow are given in the order of their assumed chronology. The parties in each case are different persons, but to facilitate comparisons the symbols used to designate the parties will be the same throughout and will indicate the role played by the particular party; thus in all five cases *O* will designate the original owner of the horse which came

by theft or fraud into the hands of *T*.

Case No. 1. *T* steals *O*'s horse and sells it to *G*, who pays full value for it and had no reason to know it had been stolen from *O*. *O* brings suit against *G* to recover the horse. *Held*, for *O*. One of the deterrents to thievery is the difficulty of disposing of stolen goods. If a purchaser like *G* were able to take free of the claim of the true owner, a market for stolen goods would be created and, thus, an incentive to theft. In any event, it was impossible for *T*, a thief who had no rightful title to the horse, to pass any title to *G*; he who has nothing can give nothing.

Case No. 2. *T* buys a horse from *O* giving as payment a forged note purporting to be that of *X*. *T* knew that the note was forged. After delivering the horse to *T*, *O* discovers that he has been defrauded. He brings suit against *T* to recover the horse. It is argued on behalf of *T* that *O* delivered the horse to him with the intent to confer title; the horse is now *T*'s, and *O*'s only remedy is to sue for the price. *Held*, for *O*. The passage of title was vitiated by the fraud of *T*; title throughout remained in *O*.

Case No. 3. The case is similar to *Case No. 2*, except that after receiving possession of the horse, *T* sold it to *G*, who knew that *T* had bought it from *O*, but had no reason to know that *T* had worked any fraud on *O*. *O* brings suit against *G* to recover the horse. It is argued on behalf of *O* that title remained in him in accordance with the principle laid down in *Case No. 2*. Since *T* had no title, he could pass none to *G*. *Held*, for *G*. It would be an intolerable burden on commerce if purchasers of property were compelled to scrutinize the details of a transaction by which the former owner voluntarily delivered it into the hands of the person now offering it for sale. Fraud takes many and subtle forms; if the victim could not recognize it, it is unreasonable to ask of a stranger to the transaction that he ascertain whether it was present. With respect to *Case No. 2*, all that was said there was with reference to the legal relations between the owner and the defrauder; the court's mind was not directed toward the possibility that a subsequent purchaser, like *G*, might intervene. The principle we are here applying is that if the horse is in the hands of *T*, or of someone who knew of his fraud, it may be recovered by *O*. In the hands of an innocent purchaser like *G*, the horse may not be recovered by *O*, for reasons we have already indicated.

Case No. 4. The case is like *Case No. 3*, except that after buying the horse from *T*, *G* sold it to *K*, who, before he bought the horse from *G*, had been informed of the fraud worked by *T* on *O*. *O* sues *K* to recover the horse. It is argued on behalf of *O* that *K* was not an innocent purchaser, since he knew of *T*'s fraud when he bought the horse. In accordance with the prin-

principle laid down in *Case No. 3*, *O* became entitled to the horse when it came into the hands of *K*. *Held*, for *K*. If the argument made by *O* were accepted, it would be possible for a person in the position of *O* to destroy the value of the title acquired by *G* simply by giving general publicity to the fact that *T* had induced the sale by fraud. Thus the objective of protecting the bona fide purchaser *G* would be defeated, for his property would become unsaleable. When the court in *Case No. 3* said that *O* could recover the horse from anyone who knew of the fraud of *T*, it did not have in mind the possibility that the horse might have passed previously through the hands of a bona fide purchaser like *G*. When the horse was bought from *T* by *G*, title to it was perfected and was no longer vulnerable to attack by *O*. *G* was then free to sell it to anyone he saw fit.

At this point I urge the reader to stop and consider whether we are now at the end of this development, and whether there is any new situation likely to arise which will require a reformulation of the principles laid down in *Case No. 4*. When he has assured himself on that point, he may proceed to

Case No. 5. This case is like *Case No. 4*, except that *K* not only knew of *T*'s fraud, but had participated in it by forging *X*'s name on the note used by *T* to pay *O* for the horse. *O* sues *K* to recover the horse. *K* rests his defense on the reasoning of *Case No. 4*; *G* had title to the horse and was free to sell it to anyone he saw fit. If *K* was guilty of any misconduct, that is a question for the criminal law; it ought not to affect his property rights. *Held?* . . . Perhaps the point of my illustration will be most effectively conveyed if at this point I leave to the reader, not only the burden of decision, but the more onerous burden of explanation.

To me it does not seem absurd to claim that the series of cases I have reported reveals something that might be called "the collaborative articulation of shared purposes." If this expression seems too pretentious, I would be content to say that these cases show that communication among men, and a consideration by them of different situations of fact, can enable them to see more truly what they were all trying to do from the beginning. In answer to Professor Nagel's contention that nothing like this can happen except in a tightly knit group, I suggest that, without losing their point at all, the five cases I have reported might each be separated by a half century from its predecessor, and that the courts which decided them might be those of five different nations. To be sure, the legal development I have suggested would be unintelligible to a human being who knew nothing of property, or of sale, or of contract. But what is the use of a search through time and space for this creature, unless it be to discredit any attempt to discover and articulate

those principles which will promote a satisfactory life in common for the human beings we know and understand, and by whom we can in turn be understood?

I hope it will be clear to the reader, as apparently it was not to Professor Nagel, that I am not foolish enough to suppose that the whole essence of legal history is compacted in the phrase, "the collaborative articulation of shared purposes." The history of the common law reveals many things, including instances of wooden literalness and even of corruption. All I am asserting is that the development indicated in my series of imaginary cases is one important aspect of legal history. How important it will be in the future depends upon whether it is Professor Nagel's philosophy of adjudication that is accepted or that which I have attempted to express here.

Before leaving the question of the efficacy of collective endeavor in defining moral and legal ends, I should like to raise for brief consideration the problem of the utility of hypothetical or imaginary cases. Throughout the centuries it has been thought that such cases may be useful in legal and moral discussions. It has been believed that sounder decisions will be reached when a wide range of such cases has been taken into account. I should like to ask how such cases fit into Professor Nagel's views of the decisional process. To be sure, we can expect him to say that they are admissible whenever their facts can be defined in non-evaluative terms. But the question is not whether they are admissible, but *why* are they useful? Am I again falling into an absurdity if I suggest they are useful because they facilitate a process I have called the collaborative articulation of shared purposes?

What is at Stake?

I have already indicated the difficulties that confront me in responding to Professor Nagel's contention that even if my premises were correct they would not justify my conclusions. Since from nonsense nothing follows — not even more nonsense — it is a little hard to know what one can say at this point in self-defense.

I can only affirm my conviction that the differences between him and me are of fundamental importance. At the present time the prevailing philosophy of ethics seems to me to have descended to a level of triviality that is truly appalling. It is my belief that this decline has been due to a general acceptance of the thesis espoused by Professor Nagel.

Perhaps I can best convey my view of the present state of ethical theory by saying it calls to mind a picture something like this. A human being, A,

is engaged in doing some act, such as giving money to a beggar, or paying a gambling debt, or dragging the unconscious victim of an automobile accident to the side of the road. An observer, *O*, points to *A*'s action and is heard to say, "This is good." At this signal ethical theoreticians begin swarming in from all sides. Their first act is to relieve the scene of the encumbrance of *A*, who is ousted without ceremony. This done, all gather round *O* and embark on a lively disputation in which everyone talks at once. How shall we characterize that sentence *O* just uttered, "This is good"? What is its "semiotic status"? Is it a mere ejaculation equally meaningful and equally meaningless, whether emitted in private or in public? Is it, in other words, like the "um-um" of a man enjoying a pot roast? Or is it perhaps a kind of news report to others about *O*'s inner state? Is it such a report coupled with an invitation to others that they join in this inner state? Or instead of being viewed as a mere invitation, shall *O*'s remark be interpreted as demanding or claiming that others should or must share his approving glow? Is *O* announcing an invitation or a directive that others do what *A* was just observed to do? At this point someone is heard to shout, "You are wrong, *O*. What *A* did was bad, not good." *O* starts to defend himself, but before he can complete a sentence the theorists swarm round him again and begin debating the kinds of demonstrations or assertions that *O* may properly employ in supporting his position. Can he only say, "Well, I feel that way"? Or can he adduce something that can be called "proof," "validation," "justification," or "explanation" for his position? What is the quintessential difference between proving a fact and demonstrating that a value judgment is right?

So the debate moves in endless circles. If the reader thinks there is exaggeration in my figurative account, I suggest that he consult the literal, sober, and useful report made in the 1957 issue of the FORUM by Professor Nakhnikian.⁸ If ethical theory is ever to escape from the wordy muddle in which it is now bogged down, I suggest that the first step will have to be to bring *A* back on the scene. If we consult with him we shall learn that his act was not an isolated event, but a response to a problem or an opportunity, and that this response was that of a whole man, or of a man trying, feebly or forcefully, to become or to remain whole. Before we can pass judgment on *A*'s response we shall have to inquire whether *A* had adequately defined the situation — that is, the problem or the opportunity — that presented itself to him. We shall have to inquire whether there were other responses available to *A* that would have been more apt. We shall have also to ask

8. George Nakhnikian, *Contemporary Ethical Theories and Jurisprudence*, 2 NATURAL LAW FORUM 4 (1957).

whether *A* gave enough thought to defining the situation and to selecting his own response, or whether, perhaps, he wasted his time in giving more thought to these problems than the situation properly demanded. As we ask these questions it will become increasingly apparent that we are no longer concerned with an isolated action, but with a process of living and deciding. If in this transition we lose the existent datum toward which *O* pointed an approving finger, we shall in compensation regain contact with questions that are real in the lives of human beings.

The poverty of the results produced by so many empirical studies of human attitudes and preferences seems also to be traceable to a methodology deriving essentially from the position taken by Professor Nagel. No one would deny, I suppose, that human attitudes and preferences characteristically change with time. It is also clear, I believe, that if the organization and proper orientation of the attitudes and preferences under study is a problem, not only for the individuals being studied, but also for the observer, the observer will be unable to predict the future course of these attitudes and preferences. One who knows the answer to a puzzle can often predict roughly the steps another will follow in solving it; if the observer is ignorant of the answer, he can only participate vicariously in the process of solution. In this participation the "clear" distinction between what is observed and its appraisal disappears. Where human attitudes and preferences are of real interest they generally relate to problems of life that are problems equally for the observer and for the observed. The consequence is that if the social scientist studying attitudes and preferences is to secure anything that can be called a reportable "datum," he must take toward his subject a point of view that effects a cross section through time, producing a kind of instantaneous snapshot arresting all motion and development. This operation does violence to the nature of the thing under observation, so that its essential reality is lost. When an attempt is made to restore at least a part of that reality, it consists in taking a series of snapshots, spaced through time and revealing a "trend." If this "trend" conveys any significant meaning, it is generally because in interpreting it we surreptitiously reintroduce the process of vicarious evaluation that was ruled out by Professor Nagel's maxim at the outset. The result is that after a study conducted by the method I have described, our understanding of the subject matter often seems to have been impoverished rather than enriched.

No one would dream of following any such self-defeating procedure if the inquiry fell within the area, say, of technology. Suppose, for example, we wanted to ascertain the "preferences" of construction engineers in solving

some problems of their specialty. It would be apparent at once that we would have to take into account knowledge, experience, and insight. Plainly a statement of preference coming from a wise and experienced engineer is not only more valuable than, but something different in fact from, that of a younger and less experienced one. The older man might very well state more accurately than the younger what the latter's preference would actually be if he were forced to deal with the problem in question. The younger man may report his own preference inaccurately because he is unable to discern the demands of the situation until it becomes something he must face in real life; the older man's insight and understanding can dispense with this crutch of direct confrontation.

So soon, however, as we touch on anything that seems to smack of "values," all of this common sense falls into the discard, and the quest for the elusive "neutral" datum is resumed with almost religious fervor. Yet is it not plain that insight and understanding can play a role in ethical judgments as well as in those of engineering? When we encounter differences of opinion among lawyers about what are in fact the ethical standards of their profession, do not these differences often reflect variations in insight and experience, rather than different opinions as to what actually "exists"? It is true of course that before we can weigh insight and experience into the balance we must ourselves participate in the process of judgment going on in the minds of our respondents. When this happens some fuzz may develop around the distinction between fact and value, but I do not think this too high a price to pay for recovering meaningful contact with reality.

These are brief and inadequate observations about what seem to me to be the things at stake in the debate between Professor Nagel and myself. I should like to make it clear that my fundamental objection to his position is that it is intellectually untenable. I do believe that a general and literal acceptance of the theory would entail disastrous consequences for law and morality. But these consequences would result from the falsity of the theory, not from the fact that it was consciously aimed at producing them.

*Is the Purpose of Law and Morality the
Resolution of Social Conflict?*

As one studies his remarks it is not easy to discern clearly Professor Nagel's own legal and moral philosophy; the negations of his article so outweigh the affirmations, both in number and explicitness, that it takes some searching to find any of the latter at all. I believe, however, that there are

two passages which reveal a positive theory of morality, and presumably also of law. Essentially this is the theory that the basic and perhaps exclusive object of morality is to resolve human conflicts. On page 78, "judgments asserting what ought to be are conceived [by Professor Nagel] as hypotheses about ways of resolving conflicting needs and interests." Again, on page 81, he asserts that "there are competing and even incompatible human objectives, both individual and social, and that the task of moral theory is to provide standards with the help of which such conflicts may in some measure be adjusted."

As applied to the law this is a conception closely associated with the position of legal positivism. There are traces of it in most writers belonging to that school, though as usual it is Kelsen who brings the view to most explicit statement:

Justice is an irrational ideal. . . . Regarded from the point of view of rational cognition, there are only interests, and hence conflicts of interests. They can be solved by an order that either satisfies one interest at the expense of the other, or seeks to establish a compromise between the two.⁹

The notion that the purpose of law is simply to settle disputes is almost a cliché of legal thinking, though I think a dangerous one. When one extends the same view to morality, as Professor Nagel apparently does, it certainly loses any platitudinous quality it might previously have had, and becomes a novel and even startling conception of the role played by moral rules in human life.

It is not difficult, I think, to show the inadequacy of any theory which treats law and morals as being exclusively concerned with the resolution of conflict. In the first place, any such theory must default before the question, What conflicts *require* resolution? Some conflicts between individuals and groups are beneficial, some are harmful.¹⁰ How shall we discriminate between the two? The second major default of the suggested theory is in answering the question, *How* shall we resolve particular conflicts? If the resolution of conflicts is to be a rational process it must in time develop principles, and those principles will inevitably enter into and shape the lives of men for good or ill. How then are we to articulate those principles by

9. *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARVARD LAW REVIEW 44, 48-49 (1941).

10. Sociology, which in recent years has tended to take absence of conflict as its only criterion of social health, is becoming concerned with the possible values of conflict. See LEWIS COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* (1956).

which conflicts and disputes are to be decided? If the answer is that we should choose those principles which give the greatest assurance that conflict will not recur, we are simply brought back full circle to the theory's first default.

If the theory is as unacceptable as I have just indicated, why is it even suggested that the purpose of law and morality is exhausted in the resolution of conflict? An easy answer would be to say that this view is required if the principle of a sharp distinction between fact and value is to preserve even a minimum plausibility; the recognition that law and morality have more affirmative tasks would make it clear as daylight that the "existence" of both of them consists in a striving which we can understand only in terms of ends that are never fully attained.

I believe, however, it would be unfair to suggest that Professor Nagel adopts the theory of law and morality he does only because this theory enables him to maintain his principal position. Rather I think the explanation lies in a moral conviction of the value of diversity and variety in human life and in the directions of human striving. This is a view I ardently share. I have attempted elsewhere to show, however, that though the moral goals of legal positivism are worthy, it serves these goals badly and indeed endangers the very ideals it so properly holds to be precious.¹¹ I refer the reader to that discussion as a supplement to what I have been able to say here. I believe it will be found to offer a sympathetic account of the essential aims of positivism — or at least as sympathetic an account as is possible when it is assumed that one's opponents in argument do not truly understand their own motivation. But in conclusion I want to repeat that my objection to Professor Nagel's view does not rest on any conjectural motivation that may lie behind it, but on the ground that it seems to me to falsify the relation between human beings and the reality by which they are compelled to orient their lives.*

11. *Positivism and Fidelity to Law—A Reply to Professor Hart's Essay*, 71 *HARVARD LAW REVIEW* 630, 669-672 (1958).

* Professor Nagel has indicated his intention to continue this discussion in the 1959 number of the *FORUM*. He plans to consider also Professor Witherspoon's comment, "The Relation of Philosophy to Jurisprudence," which appears in the "Notes" section of this number at 105-134.—Ed.